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ACH v. PAY

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[DIVORCE PETITION NO: WA-33-478-11-2020]
30 NOVEMBER 2023

B

Abstract – *(i) Section 77(1) of the Law Reform (Marriage and Divorce) Act 1967 reveals the deliberate use of the term 'may', underscoring the court's discretionary power in adjudicating the validity of a wife's claim for spousal maintenance. As such, there exists no inherent entitlement for a wife to receive spousal maintenance from her husband, particularly when she possesses the capacity to generate her own income and sustain an independent livelihood; (ii) A child possesses the right to maintain a consistent and valuable relationship with both parents. Neither parent holds superiority over the other; and (iii) Access to a child should be recognised as an inherent right belonging to the child rather than solely to the parents. Any attempt to restrict a parent's access to a child would inherently constitute a violation of the child's rights.*

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FAMILY LAW: *Divorce – Proceedings – Maintenance – Spousal maintenance – Whether there was inherent entitlement for wife to receive spousal maintenance from husband – Assessment of 'means and needs' – Whether fulfilled – Breakdown of marriage – Contributory factors – Whether irretrievable breakdown of marriage due to wife's actions – Law Reform (Marriage and Divorce) Act 1976, ss. 77(1) & 78*

F

FAMILY LAW: *Children – Maintenance – Child maintenance – Whether claims inflated and exaggerated – Absence of receipts – Whether monthly child maintenance more appropriate than one-time lump sum payment*

FAMILY LAW: *Children – Guardianship – Joint guardianship – Whether child possesses right to maintain consistent and valuable relationship with father and mother – Whether neither parent holds superiority over the other – Whether both parties granted joint guardianship*

G

FAMILY LAW: *Children – Access – Grant of – Whether attempt to restrict parent's access to child constitute violation of child's rights – Adopting phased access strategy to facilitate gradual and supportive connection between parent and child – Whether access to child recognised as right belonging to child rather than solely to parents*

H

FAMILY LAW: *Divorce – Assets – Matrimonial assets – Division of – Entitlement – Properties acquired during course of marriage – Equitable portion*

I

The petitioner and respondent ('parties') had registered their marriage in October 2014 and thereafter resided in their matrimonial home ('matrimonial home'). In June 2016, the parties were blessed with a son ('child'). Over time, the marriage gradually deteriorated, leading to the petitioner and child departing from the matrimonial home. Subsequently, in October 2020, the petitioner commenced divorce proceedings by filing a divorce petition ('divorce petition'). The respondent filed a cross petition ('cross petition') in December 2020. In the deliberation of whether spousal maintenance should be awarded, the issues that arose were (i) the cause of the breakdown of the marriage as well as the contributory factors of such breakdown; and (ii) whether the petitioner had fulfilled the 'means and needs' assessment. With regard to the child, the issues that arose were (i) whether guardianship should be joint as the petitioner insisted on sole guardianship; (ii) whether the respondent was obliged to maintain the child, and what amount would be appropriate; and (iii) whether the respondent should have access to the child, and on what terms. As for the assets, the issue that arose was whether the petitioner was entitled to a division of all the matrimonial assets, and what portion would be equitable.

Held (ordering accordingly):

(1) Section 77(1) of the Law Reform (Marriage and Divorce) Act 1976 ('Act') reveals the deliberate use of the term 'may', underscoring the court's discretionary power in adjudicating the validity of the petitioner's claim for spousal maintenance. As such, there exists no inherent entitlement for a wife to receive spousal maintenance from her husband, particularly when she possesses the capacity to generate her own income and sustain an independent livelihood. The respondent was not under any obligation to make any form of maintenance payment to the petitioner, whether in arrears or in the future. (paras 9 & 11)

(2) The determination of spousal maintenance, as outlined in s. 78 of the Act, places substantial emphasis on evaluating the 'means and needs' of both parties involved. The petitioner had presented an extensive list of the claimed essentials to the court. However, the absence of receipts to substantiate the actual costs, coupled with the court's assessment, revealed that many of these items appeared to be unnecessary. Further, the only evidence adduced during the hearing of the divorce petition and cross petition regarding the petitioner's salary was limited to Form CP58 for the year 2020, which indicated that her salary was RM5,232. Relying on Form CP58 may not present an accurate reflection on the petitioner's financial status. The petitioner had the ability to earn an income sufficient to cater to her means as she was currently working as an insurance agent. Taking also into consideration that the marriage only lasted five years, it would be unjust for the respondent to bear the burden of a perpetual monthly spousal maintenance, extending potentially

throughout the entirety of the petitioner's life or until she remarried or 'lives in adultery' with another man as stipulated in s. 82 of the Act. Spousal maintenance is not intended to perpetuate an enduring financial reliance by the former wife. (paras 32-39)

(3) The petitioner had levied numerous accusations against the respondent by alleging that he had contributed to the demise of their marriage by his conduct and behaviour. However, the petitioner did not furnish any documentary evidence to support the allegations and her oral evidence was not credible. The petitioner's assertions were exaggerated and magnified, and she could not produce concrete evidence to support her claim that the respondent had engaged in extramarital affairs. The pivotal moment in the marriage occurred in October 2019 when, in the absence of the respondent who was travelling, the petitioner not only vandalised the matrimonial home but also departed with the child. The petitioner had failed to produce any tangible evidence substantiating the respondent's alleged neglect of both her and the child. It became evident that the petitioner harboured unrealistic expectations of marriage particularly in her continuous expression of dissatisfaction with the respondent. The petitioner's behaviour was unreasonable, and the irretrievable breakdown of the marriage was due to her actions. (paras 19-31)

(4) With regard to maintenance for the child, the petitioner had sought either a one-time lump sum payment of RM1.8 million, or as an alternative, a monthly amount of RM15,000. A singular lump sum payment for the child was not appropriate, given the myriad of factors that may arise throughout the child's lifetime. The petitioner's presented expenses for raising the child were, however, inflated and exaggerated and a critical concern was the absence of receipts to substantiate that the listed items accurately reflected the genuine costs incurred. After deliberation, this court ordered that the respondent provide the petitioner with a monthly child maintenance of RM3,000. It was also crucial to recognise that mothers who are endowed with the ability to generate income, should actively participate in sharing the financial responsibility of providing for their children. (paras 43-48)

(5) Despite the separation of the parties, the child had continuously resided with the petitioner and this underscored the undeniable reality that the child remained reliant on the petitioner for his physical, emotional and mental development. Consequently, uprooting the child from his current environment would not align with the best interest of his welfare. In the absence of any evidence indicating neglect, abuse or any other form of unfitness on the part of the petitioner, sole custody, care and control of the child was granted to the petitioner. However, the respondent should

not be denied joint guardianship, and it was only fair that the petitioner put aside her differences with the respondent for the sake of co-parenting. The child possessed the right to maintain a consistent and valuable relationship with both parents. While the child's primary residence was with the petitioner, as stipulated by s. 88(3) of the Act, neither parent holds superiority over the other. Hence, both parties were granted joint guardianship as this arrangement underscored the significance of collaborative decision making concerning the child's health, education, religion and general support. (paras 50-58)

(6) Given that the petitioner had sole custody, care and control of the child, it was only just and equitable that the respondent be granted access. Access to the child should be recognised as an inherent right belonging to the child rather than solely to the parents. Any attempt to restrict the respondent's access to the child would inherently constitute a violation of the child's rights. Taking into consideration the petitioner's concerns regarding the suitability of unsupervised and overnight access due to the child's current estrangement from the respondent, this court opted to adopt a phased access strategy, designed to facilitate a gradual and supportive reconnection between the child and the respondent. Consequently, the terms of access granted to the respondent to the child were, *inter alia*, online/virtual access to the child for a duration of up to 30 minutes on Mondays, Wednesdays and Fridays and access by the respondent to the child every Saturday from 10am to 3pm at a mutually agreed upon location, under the supervision of the petitioner exclusively. (paras 59-67)

(7) Divorce proceedings should not be converted into a revenue-generating exercise. Thus, in regard to the assets, it would be fair and reasonable for each party to retain their respective properties in Taman Vista Jaya. As for the Kuala Ampang and Pandan Terrace properties, as the respondent had failed to provide any substantiating evidence for his claim that the properties were held in trust by him for his friends, it was concluded that the respondent was the sole owner of both the Kuala Ampang and Pandan Terrace properties. Considering that such properties were acquired during the course of the marriage, these properties qualified as matrimonial assets. This court granted the petitioner 25% of the realisable value of both the Kuala Ampang and Pandan Terrace properties. Also, considering the fact that the respondent was ordered to fulfil his financial responsibilities, including child maintenance and division of two properties, it was fair and equitable for the respondent to retain ownership of the shares in the company Super Group Resources Sdn Bhd. This was aimed at balancing the financial obligations imposed on the respondent while acknowledging the lack of contribution from the petitioner towards the acquisition or growth of the shares in question. (paras 73-80)

Case(s) referred to:
APE v. APF [2015] SGHC 17 ***(refd)***
Choong Yee Fong v. Ooi Seng Keat (Joint Respondent) [2006] 5 CLJ 144 HC ***(refd)***
Chow Sook Pheng v. Wong Maun Hoong [2011] CLJU 260; [2011] 1 LNS 260 HC ***(refd)***
CSM v. TCC [2023] 3 CLJ 403 HC ***(refd)***
CX v. CY (Minor: Custody And Access) [2005] 3 SLR 690 ***(refd)***
Dr Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly & Anor [2011] 6 CLJ 782 HC ***(refd)***
Gan Koo Kea v. Gan Shiow Lih [2003] CLJU 440; [2003] 1 LNS 440 HC ***(refd)***
K Shanta Kumari v Vijayan [1985] CLJU 135; [1985] 1 LNS 135 HC ***(refd)***
Lim Eng Kuan v. Julie Tay Suan Sim [2013] 5 CLJ 392 HC ***(refd)***
Quek Lee Tiam v Ho Kim Swee (alias Ho Kian Guan) [1995] SGHC 23 ***(refd)***
Tan Sherry (P) v. Soo Sheng Fatt (L) [2016] CLJU 1586; [2016] 1 LNS 1586 HC ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] CLJU 138; [1977] 1 LNS 138 FC ***(refd)***
Thevathasan v. Thevathasan [1960] CLJU 153; [1960] 1 LNS 153 HC ***(refd)***
V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 103
Guardianship of Infants Act 1961, ss. 3, 5
Law Reform (Marriage and Divorce) Act 1976, ss. 54(1)(b), 76, 77(1), (2), 78, 82, 88(3), 89, 92, 93(2)

Other source(s) referred to:
Claire, Sturge and Danya Glaser, *Contact and Domestic Violence – The Experts' Court Report* [2000] Fam Law 615

For the petitioner - Devinder Kaur, AS Dhaliwal & Vimalan Ramanathan; M/s Edorra Arfah Khandhar
For the respondent - Kelvinder Singh, WK Wong & HS Tan; M/s WK Wong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] These were the divorce petition filed by the petitioner wife and cross-petition filed by the respondent husband. Whilst the parties had agreed that the custody care and control of the child of the marriage would be with the petitioner, they had disputed issues pertaining to guardianship, spousal maintenance, child maintenance, access to the child, and division of assets.

[2] In the interest of privacy of the parties concerned, and sensitivity of the issues in these proceedings, the petitioner and respondent and their child have been anonymised in this judgment as ACH, PAY, and KEY respectively.

The Factual Background

[3] The petitioner and respondent (collectively, "the parties"), were both insurance agents, aged 38 years at the time of the hearing. They registered their marriage in October 2014, and thereafter resided in Cheras ("the matrimonial home"). In June 2016, the parties were blessed with a son ("the child").

[4] Over time, the marriage gradually deteriorated, marked by frequent arguments and conflicts. The culmination of these issues led to a significant turning point in October 2019, when the petitioner and the child departed from the matrimonial home.

[5] Subsequently, in October 2020, the petitioner commenced divorce proceedings by filing a divorce petition ("the divorce petition"). In response, the respondent filed a cross-petition ("the cross-petition") in December 2020.

[6] I allowed the petition and cross-petition partially, which included joint guardianship, a structured plan for gradual access to the child by the respondent, child maintenance obligations imposed on the respondent, and equitable division of matrimonial assets. The following are my reasons.

The Issues

[7] The issues that had to be addressed by this court were as follows:

(i) spousal maintenance – in the deliberation of whether spousal maintenance should be awarded, the following issues were imperative to consider, namely, (i) the cause of the breakdown of the marriage as well as the contributory factors of such breakdown; and (ii) whether the petitioner had fulfilled the 'means and needs' assessment;

(ii) the child – with regard to the child, the issues were (i) whether guardianship should be joint as the petitioner insisted on sole guardianship; (ii) whether the respondent was obliged to maintain the child, and what amount would be appropriate; and (iii) whether the respondent should have access to the child, and on what terms; and

(iii) the assets – with regard to the assets, the issue was whether the petitioner was entitled to a division of all the matrimonial assets, and what portion would be equitable.

Contentions, Evaluation, And Findings

Spousal Maintenance

[8] With regard to spousal maintenance, at the outset I found the petitioner's claim to be somewhat unclear. Whilst she had specified a one-time lump sum payment of RM750,000 in her pleadings, she claimed an additional RM750,000 in her witness statement. This suggested a dual claim,

encompassing maintenance arrears and future support. Simultaneously, the petitioner submitted a comprehensive list enumerating various items along with their associated monthly costs, asserting their indispensable nature for her well-being.

[9] I took the position that the respondent was not under any obligation to make any form of maintenance payment to the petitioner, whether in arrears or in the future, and the rationale for this stance is outlined below.

[10] In delving into the intricacies of the maintenance issue, particular attention was directed to s. 77(1) of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act"), which reads:

> Section 77 – Power of court to order maintenance of spouse
>
> (1) **The court may** order a man to pay maintenance to his wife or former wife:
>
> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive.
>
> (emphasis added)

[11] A careful examination of s. 77(1) of the Law Reform (Marriage and Divorce) Act reveals the deliberate use of the term 'may', underscoring the court's discretionary power in adjudicating the validity of the petitioner's claim for spousal maintenance. As such, there exists no inherent entitlement for a wife to receive spousal maintenance from her husband, particularly when she possesses the capacity to generate her own income and sustain an independent livelihood. The court's analysis hinges on a thorough evaluation of various factors, collectively influencing the court's determination regarding the justification for maintenance from the respondent.

[12] It is incumbent upon me to assert that the bygone era, wherein married women relied on their husbands for financial support and marriage was predominantly seen as an arrangement for a woman's financial care, has evolved.

[13] Contemporary marriage, however, is a partnership, *albeit* with varying degrees of equality, where both parties commonly contribute financially. This is especially evident in today's societal landscape, which strives to eliminate gender discrimination. In alignment with this pursuit of gender equality, compelling a man to pay maintenance to his wife or former wife solely based on his gender, contradicts the principles of gender equality, particularly when both parties are financially independent individuals.

[14] Notably, while a man is obligated to maintain his wife or former wife, s. 77(2) of the Law Reform (Marriage and Divorce) Act specifies that a woman is obligated to maintain her husband or former husband only if he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health. This underscores the view that s. 77 of the Law Reform (Marriage and Divorce) Act perpetuates gender inequality within the context of marriage.

[15] Consequently, the court must exercise caution in awarding maintenance to a wife or former wife, particularly when she possesses the means to generate income. Despite the discretionary power held by the court in handling maintenance claims by a wife, the court is guided by the degree of responsibility assigned to each party for the breakdown, and the 'means and needs' test, outlined by s. 78 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 78 - Assessment of maintenance
>
> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on **the means and needs of the parties**, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, b**ut shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage**.
>
> (emphasis added)

[16] In my evaluation of whether the petitioner was deserving of maintenance, I found guidance in established legal precedents, specifically the cases of *Dr Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly & Anor* [2011] 6 CLJ 782, and *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474. These cases underscore the importance of considering several key factors, such as the following:

(i) the income, earning capacity, property, or financial resources that each party presently possesses or is likely to possess in the foreseeable future;

(ii) the financial needs, obligations, and responsibilities that each party currently or is likely to have in the foreseeable future;

(iii) the standard of living enjoyed by the family prior to the breakdown of the marriage;

(iv) the age of each party and the duration of their marriage;

(v) any existing health, physical, or mental disability of the parties;

(vi) the respective contributions made by each party to the welfare of the family; and

(vii) the duration of the marriage.

Cause Of Breakdown Of The Marriage

[17] Given the petitioner's claim for maintenance, the next issue before the court was to determine the degree of responsibility each party bore for the breakdown of the marriage, as outlined in s. 78 of the Law Reform (Marriage and Divorce) Act.

[18] In presenting their respective cases, both parties invoked s. 54(1)(b) of the Law Reform (Marriage & Divorce) Act, alleging that the other had behaved unreasonably, making it impracticable for them to cohabit. The relevant provision reads:

> Section 54 - Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
>
> ...
>
> (b) that the respondent has **behaved in such a way** that the petitioner cannot reasonably be expected to live with the respondent.
>
> ...
>
> (2) In considering whether it would be just and reasonable to make a decree the **court shall consider all the circumstances**, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a *decree nisi* subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.
>
> (emphasis added)

[19] In seeking to persuade this court that the breakdown of the marriage was solely attributable to the conduct of the respondent, the petitioner levied numerous accusations against him. She alleged that he contributed to the demise of the marriage by spending time with other women, ordering her to obtain a loan to help with household expenses, compelling her to work excessively to support his insurance agency, taking holidays with individuals other than her, returning home late from work, engaging in prolonged movie and computer game sessions into the late hours, and allowing her to endure postpartum haemorrhage without adequate support.

[20] Significantly, the petitioner did not furnish any documentary evidence to support the aforementioned allegations; her testimony stood as the sole foundation for these assertions. Given the absence of corroborating documentation, the only evidence that the court could consider was the petitioner's oral evidence, which in my assessment was not credible, for the following reasons.

[21] The petitioner's assertions were exaggerated and magnified. While she contended that the respondent engaged in extramarital affairs, she could not produce concrete evidence to support this claim, aside from a shirtless selfie of him. It defied the bounds of imagination to deduce infidelity from such a photograph. A

[22] Her complaint about the respondent returning home late at night was countered by his explanation that it was a consequence of his work nature, often requiring outstation trips. Moreover, an inconsistency arose as the petitioner simultaneously alleged that the respondent spent extended hours playing computer games in his room at night, undermining her contention of his involvement with other women. B C

[23] Considering that the petitioner herself works as an insurance agent, one would expect her to comprehend the demands and interactions inherent in the respondent's profession.

[24] Indeed, during cross-examination, the petitioner acknowledged that the commissions derived from her role as an insurance agent with the respondent were deposited directly into her personal account. This again contradicted the petitioner's oral evidence that she was made to slog for the respondent. D

[25] The petitioner also went as far as uploading a video containing disparaging remarks about the respondent, fully aware that such actions would tarnish his image and reputation. Adding to the distress, she shared the video not only with her agents but also with customers, further escalating the animosity between the parties. E

[26] The pivotal moment in the marriage occurred in October 2019 when, in the absence of the respondent who was travelling, the petitioner not only vandalised the matrimonial home, but also departed with the child. This marked the point of no return in the marriage. F

[27] It became evident that the petitioner harboured unrealistic expectations of marriage, particularly in her continuous expression of dissatisfaction with the respondent's perceived prioritisation of work over their relationship. G

[28] The reality is that, once the honeymoon phase concludes, married couples must discard their rose-tinted glasses and confront the daily challenges, such as financial responsibilities, interactions with extended family, and caring for children once they enter the picture. H

[29] The petitioner anticipated that the 'honeymoon' would be an enduring idyll. However, when its bliss proved transient, disillusionment settled in. The petitioner's discontent and disappointment with the respondent and the I

marriage escalated over time. Even during the proceedings of the divorce petition and cross-petition, her testimony was marked by her cantankerous demeanour, manifesting anger and frustration as she repeatedly lashed out at the respondent.

[30] Except for the display of her own misery and frustration, the petitioner had failed to produce any tangible evidence substantiating the respondent's alleged neglect of both her and the child. Conversely, the respondent contended that the petitioner was chronically discontented and driven by greed, making it impossible to satisfy her. As such, as the petitioner's dissatisfaction intensified, the respondent gradually distanced himself leading to an inevitable estrangement between parties.

[31] Consequently, my conclusion was that the petitioner's behaviour was unreasonable, and that the irretrievable breakdown of the marriage was due to her actions.

Whether Petitioner Had Fulfilled The 'Means And Needs' Assessment

[32] It was crucial to underscore that the determination of spousal maintenance, as outlined in s. 78 of the Law Reform (Marriage and Divorce) Act, places substantial emphasis on evaluating the 'means and needs' of both parties involved. This provision necessitates a thorough examination not only of the respondent's means, but also of the petitioner's.

[33] The petitioner presented an extensive list of the claimed essentials to the court. However, the absence of receipts to substantiate the actual costs, coupled with my assessment, reveals that many of these items appear to be unnecessary. Moreover, even if these items were deemed essential, the associated costs seemed inflated.

[34] The respondent rightly pointed out that the petitioner did not pursue interim maintenance, despite a separation spanning over four years. The failure to seek interim maintenance raised questions about the immediacy and urgency of the petitioner's financial needs. Applying for interim maintenance would have mandated both parties to disclose their income to the court.

[35] However, the only evidence adduced during the hearing of the divorce petition and cross-petition regarding the petitioner's salary was limited to Form CP58 for the year 2020, which indicated that her salary was RM5,232. It was essential to note that Form CP58 serves as an income statement rather than a comprehensive tax filing form. This document primarily outlines incentives, allowances, bonuses, *etc.* for agents, dealers, and distributors, akin to the EA form received by employees. In my view, relying on Form CP58 may not present an accurate reflection of the petitioner's financial status. A more convincing portrayal would have been her current tax filing forms, which were not adduced.

[36] It was my finding, therefore, that the petitioner has the ability to earn an income sufficient to cater to her means. She is only 38 years old, possesses a Bachelor of Science in Industrial Mechanical Design from University Technology Malaysia, and is currently working as an insurance agent. She is also the registered proprietor of a property in Taman Vista Jaya.

[37] The significance of the potential earning capacity of a spouse claiming maintenance was underscored in the case of *Choong Yee Fong v. Ooi Seng Keat (Joint Respondent)* [2006] 5 CLJ 144, where Faiza Thamby Chik J, in referring to the earlier case of *Thevathasan v. Thevathasan* [1960] CLJU 153, had stated:

> It may be summed up that *s. 78 of the Act requires this court to assess the means and the needs of both the petitioner and the respondent and also their respective conduct which contributed to the irretrievable breakdown of the marriage*, in coming to a decision if the petitioner is entitled to a maintenance at all and if so, the amount to be awarded. In first assessing the means of the petitioner, attention is drawn to the petitioner's affidavit at para. 9 (encl. 76). ...
>
> *The petitioner is not in a situation where she is incapable of supporting herself but rather a case where there is an able-bodied petitioner who refuses to seek employment in order to claim for maintenance from the respondent*. This refusal to be self-supportive is further proven by the petitioner herself whereby despite of her alleged tight financial situation, *the petitioner has shown total lack of initiative in mitigating her financial woes* but has instead went on a spending spree as evidenced by her indiscriminate use of credit cards facilities which according to the petitioner's averment at para. 12(a) and (b) of encl. 76 amounts to a total sum of RM114,668.64. The potential earning power of the claimant must also be considered.
>
> ...
>
> *Therefore, applying the principle enunciated by the cases cited above, to the facts before me, it can be established that the petitioner who is 41 years of age, able bodied and until 2001 was earning a salary of RM1,800 per month certainly has earning potential with relevant past working experience which help enhances her earning power in the market work force*. The petitioner has in her own affidavit at paras. 13 and 14 of encl. 76 admits to renting out on the asset, namely the apartment at RM620 per month (with a market potential rental rate of RM700 per month see exh. CYF at encl. 79) whilst the instalment payment to the bank is RM470. This indicates that the petitioner earns an income of RM150 per month from the apartment. In gist, the petitioner has the means within the contemplation of s. 78 of the Act, to be self-sufficient and self-reliant. It must be emphasised that the *marriage though registered in 1984, has lasted for less than 10 years and with no children*. Although the parties have since lived separately in 1994, the marriage, for all intents and purposes, has broken down irretrievably even before the physical separation in 1994. The petitioner who was 31 years of age in 1994 was working and self-supportive until her alleged unemployment in 2001. (emphasis added)

[38] I also had to consider that the marriage lasted only five years before it eventually broke down. It would, therefore, be unjust for the respondent to bear the burden of a perpetual monthly spousal maintenance, extending potentially throughout the entirety of the petitioner's life or until she remarries or 'lives in adultery' with another man, as stipulated in s. 82 of the Law Reform (Marriage & Divorce) Act.

[39] I, therefore, took the position that the petitioner ought to try to regain self-sufficiency, 'as an order of maintenance is not intended to create life-long dependency by the former wife on the former husband': *Quek Lee Tiam v Ho Kim Swee (alias Ho Kian Guan)* [1995] SGHC 23. Rather, the focus should be on encouraging the petitioner to strive toward regaining self-sufficiency. This perspective acknowledges that spousal maintenance is not intended to perpetuate an enduring financial reliance by the former wife.

The Child

Whether Respondent Was Obliged To Maintain The Child

[40] It is trite law, pursuant to s. 92 of the Law Reform (Marriage & Divorce) Act, that every parent has the duty to maintain his or her child, regardless of who has custody. The provision reads:

> Section 92 - Duty to maintain children
>
> Except where an agreement or order of court otherwise provides, it shall be the **duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody** of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.
>
> (emphasis added)

[41] Section 93 of the Law Reform (Marriage & Divorce) Act takes an even more comprehensive stance by expressly articulating the responsibility of a man to provide maintenance for the betterment of his child. The provision reads:

> Section 93 - Power for court to order maintenance for children
>
> (1) The court may at any time **order a man to pay maintenance for the benefit of his child**:
>
> (a) if he has refused or neglected reasonably to provide for the child;
>
> (b) if he has deserted his wife and the child is in her charge;
>
> (c) during the pendency of any matrimonial proceedings; or
>
> (d) when making or subsequent to the making of an order placing the child in the custody of any other person.
>
> ... (emphasis added)

[42] With regard to maintenance for the child, the respondent had consistently been disbursing RM2,000 monthly to the petitioner. However, the petitioner sought either a one-time lump sum payment of RM1.8 million or, as an alternative, a monthly amount of RM15,100. This relief was based on the following breakdown she provided, enumerating the following:

No.	Monthly expenses of the said child	MYR
i	Tuition for computer class	1,000
ii	Tuition for music class	500
iii	School Registration fees Daycare Co-curricular activities	300 450 900 400
iv	Maid	1,500
v	Apparel & shoes	500
vi	Toys	700
vii	Child's Pet	500
viii	Outdoor activities - playland and food	600
ix	Holiday expenses	1,500
x	Parties and gifts	1,300
xi	Ipad & laptop	500
xii	Educational tools	200
xiii	Science experiments	500
xiv	Stationeries	550
Total:		15,100

[43] In my view, providing a singular lump sum payment for the child was not appropriate, given the myriad of factors that may arise throughout the child's lifetime, that could render such a payment impractical. Hence, after thorough deliberation, my decision was to order the respondent to provide the petitioner with a monthly child maintenance of RM3,000. Additionally, the respondent is obligated to share equally in the costs related to the child's health and education, encompassing school fees and associated activities. The rationale for this decision is outlined below.

[44] In my view, the petitioner's presented expenses for raising the child were inflated and exaggerated. A critical concern was the absence of receipts to substantiate that the listed items accurately reflected the genuine costs incurred.

[45] While the petitioner referenced the case of *CSM v. TCC* [2023] 3 CLJ 403, as precedent justifying the lack of receipts, it was crucial to note that that case pertained to children studying abroad at the tertiary level. In the present case, the child just turned seven years old at the time of the hearing, and several items on the list were unnecessary or exhibited inflated costs.

[46] Notably, expenses such as computer and music classes were discretionary, and lacking proof to justify their purported costs. The monthly allocation of RM1,500 for holidays and RM1,300 for parties and gifts for a seven-year-old was exaggerated.

[47] Furthermore, it was imperative to recognise that, as a gainfully employed mother, the petitioner should share the financial responsibility for the child's upkeep, in accordance with s. 93(2) of the Law Reform (Marriage & Divorce) Act, which reads:

> Section 93 – Power for court to order maintenance for children
>
> (2) The court shall have the **corresponding power to order a woman to pay or contribute towards the maintenance of her child** where it is satisfied that having regard to her means it is reasonable so to order. (emphasis added)

[48] In our present-day society, it is crucial to recognise that mothers who are endowed with the ability to generate income, should actively participate in sharing the financial responsibility of providing for their children. This perspective advocates for a more equitable distribution of financial burdens, moving away from the traditional tendency to place the entirety of this responsibility on fathers. To reinforce this standpoint, I found guidance in the wisdom of Hashim Hamzah JC (now JCA) as expressed in the case of *Lim Eng Kuan v. Julie Tay Suan Sim* [2013] 5 CLJ 392; [2014] 7 MLJ 778.

Whether Parties Should Have Joint Guardianship Of The Child

[49] Given that the child was only seven years old at the time of the hearing, the respondent did not significantly challenge the issue of custody, care, and control. In any event, I took the view that the doctrine of tender years as outlined in s. 88(3) of the Law Reform (Marriage & Divorce) Act, applied. The provision reads:

> Section 88 – Power for court to make order for custody
>
> (3) There shall be a rebuttable presumption that it is for the good of a **child below the age of seven years to be with his or her mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. (emphasis added)

[50] It was noteworthy that despite the separation of the parties, the child had continuously resided with the petitioner. This underscores the undeniable reality that the child remains reliant on the petitioner for his

physical, emotional, and mental development. Consequently, uprooting the child from his current environment would not align with the best interest of his welfare. Numerous legal precedents, including cases like *K Shanta Kumari v. Vijayan* [1985] CLJU 135; [1985] 1 LNS 135; *Gan Koo Kea v. Gan Shiow Lih* [2003] CLJU 440; [2003] 1 LNS 440; and *Teh Eng Kim v. Yew Peng Siong* [1977] CLJU 138; [1977] 1 LNS 138; [1977] 1 MLJ 234, support the notion that, particularly when dealing with a very young child, it is in their best interest to remain with his or her mother. In *Teh Eng Kim v. Yew Peng Siong*, Raja Azlan Shah FCJ (as he then was) eloquently explained the significance of the relationship between a young child and his mother, in the following passage:

> The youngest child, Bernard, is of tender years. In my opinion, his place right now is with the mother. *"No thing, and no person," said Sir John Romilly MR, in the case of Austin v. Austin [1865] 35 Beav 259 263 "and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place …*" This view has found judicial favour in many jurisdictions: in Australia, for example, in *Kades v. Kades*, (4) the High Court, in a joint judgment stated: "What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together." In Canada, Muloch CJ in *Re Orr* [1973] 2 DLR 77 commented that, "In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father …
>
> (emphasis added]

[51] Consequently, the onus rested on the respondent to rebut the presumption favouring the petitioner, essentially requiring a demonstration of the petitioner's unsuitability as a mother. In the absence of any evidence indicating neglect, abuse, or any other form of unfitness on the part of the petitioner, my decision was to grant sole custody, care, and control of the child to the petitioner.

[52] Nevertheless, the respondent persisted in seeking joint guardianship of the child, invoking s. 5 of the Guardianship of Infants Act 1961 ("Guardianship of Infants Act"), which reads:

> Section 5 - Equality of parental rights
>
> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, **a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal**.

A

> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father. (emphasis added)

[53] In accordance with s. 3 (duties of guardian of person) of the Guardianship of Infants Act, both parents share equal responsibilities for the
B child's comprehensive welfare, encompassing health, education, religion, and general support. A fundamental tenet of these responsibilities is the child's inherent right – to nurture meaningful connections with both parents.

[54] The petitioner asserted that joint guardianship would be challenging due to lingering acrimony between her and the respondent. I took the view
C that such an excuse was insufficient to deny the respondent joint guardianship, especially considering the evidence indicating the petitioner's consistent dissatisfaction with the marriage. It was, therefore, only fair that the petitioner put aside her differences with the respondent for the sake of co-parenting.

D

[55] I was also guided by the decision of *Tan Sherry (P) v. Soo Sheng Fatt (L)* [2016] CLJU 1586; [2016] 1 LNS 1586; [2016] MLJU 1264, whereby Vazeer Alam Mydin Meera J (as he then was) acknowledged that in a family setting, the general rule of raising the children has to be a joint cooperative enterprise of the parents:

E

> Even when the marriage breaks down, instead of being at war with each other as husband and wife, **both should put aside their personal differences, to jointly decide on what would be best for the child**. This would entail them to communicate with each other in a civil and courteous manner for the sake of their child's upbringing and
F development. This would to some extent constrain and require both to discuss with each other on all matters relating to the child such that neither should make unilateral decisions to the exclusion of the other. See the application of that principle by Lee Swee Seng J in *CY v. CC* [2015] MLJU 930 HC. (emphasis added)

G **[56]** Upon a thorough examination of the evidence adduced, I found no compelling reason to deny the respondent guardianship. It was imperative to underscore that the child possesses the right to maintain a consistent and valuable relationship with both parents. While the child's primary residence is with the petitioner, as stipulated by s. 88(3) of the Law Reform (Marriage & Divorce) Act, neither parent holds superiority over the other. Recognising
H the distinct dynamics of a child's relationship with both parents is pivotal as reiterated in the Singapore case of *CX v. CY (Minor: Custody And Access)* [2005] 3 SLR 690, where the Court of Appeal of Singapore upheld the importance of joint parenting as the preferred approach.

I

[57] Both parties must bear in mind that the respondent had been ordered to provide monthly child maintenance in the amount of RM3,000. It was imperative to acknowledge that a father's role extends beyond financial support; active participation in the child's upbringing and engagement in his growth and development is equally vital.

[58] Hence, my decision was for both parties to have joint guardianship. This arrangement underscores the significance of collaborative decision-making concerning the child's health, education, religion, and general support.

Whether Respondent Should Have Access To The Child

[59] Given that the petitioner had sole custody, care, and control of the child, it was only just and equitable that the respondent be granted access.

[60] The petitioner asserted that the respondent's access to the child should be supervised continuously, citing the respondent's current status as a stranger to the child.

[61] I was unable to agree with the petitioner for several reasons. Firstly, it was the petitioner who had caused the estrangement by removing the child from the respondent's presence. Consequently, I could not allow her to rely on her own unjustifiable actions to impose restrictions or limitations on the respondent's access to the child.

[62] Secondly, it was crucial to underscore the pivotal role that a father plays in fostering a nurturing environment for his child. This significance was notably highlighted in the Singapore case of *APE v. APF* [2015] SGHC 17, where Tan Siong Thye J referenced the enlightening article titled *Contact and Domestic Violence – The Experts' Court Report* [2000] Fam Law 615, authored by Claire, Sturge, and Danya Glaser. This expert report illuminated the profound impact that a father can have on his child's life, emphasising the essential role a father plays in promoting the child's overall well-being and holistic development.

[63] In fact, both parents assume indispensable roles in a child's life, each offering distinct, invaluable, and irreplaceable contributions. It was also my view that access to the child should be recognised as an inherent right belonging to the child rather than solely the parents. Therefore, any attempt to restrict the respondent's access to the child would inherently constitute a violation of the child's rights.

[64] The legal precedent set forth in *Chow Sook Pheng v. Wong Maun Hoong* [2011] CLJU 260; [2011] 1 LNS 260 underscores the paramount importance of preserving the father-child bond. In that case, the court acknowledged that the child's welfare and holistic development are best served when the child has a meaningful connection with his father. Depriving a child of the

opportunity to establish and nurture such a relationship can potentially have adverse consequences for his emotional and psychological well-being, as eloquently elaborated upon by Yeoh Wee Siam JC (as she then was), in the subsequent passage:

> In my opinion, *it is for the welfare and in the best interests of the children that they spend as much time as possible with not only their mother but also their father*. Just because the parents' marriage has broken down, it does not mean that the 3 children should be alienated from either parent. I believe a child would develop better if he or she spends as much time as possible with both parents. What if, at the end of the case, the respondent Husband is given custody of the 3 children? *By then the damage would have been caused if, in the interim, the respondent Husband was denied of access to the 3 children resulting in their estrangement and discomfort with each other. This would not be for the welfare of the children*. (emphasis added)

[65] Moreover, this court possesses the power to establish specific terms and conditions within a custody order, as conferred by the provisions outlined in s. 89 of the Law Reform (Marriage & Divorce) Act, which reads:

> Section 89 – Orders subject to conditions
>
> (1) An order for custody may be made subject **to such conditions as the court may think fit to impose**, and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.
>
> (2) Without prejudice to the generality of subsection (1), an order for custody may:
>
> (a) contain conditions as to the place where the child is to reside, as to the manner of his or her education, and as to the religion in which he or she is to be brought up;
>
> (b) provide for the child to be temporarily in the care and control of some person other than the person given custody;
>
> (c) **provide for the child to visit a parent deprived of custody** or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;
>
> (d) **give a parent deprived of custody** or any member of the family of a parent who is dead or has been deprived of custody **the right of access to the child** at such times and with such frequency as the court may consider reasonable; or
>
> (e) prohibit the person given custody from taking the child out of Malaysia. (emphasis added)

[66] It was also essential to recognise that supervised access is not intended as a permanent arrangement. Instead, it serves as a transitional arrangement to establish familiarity between the child and the parent when such connection is lacking.

[67] Taking into consideration the petitioner's concerns regarding the suitability of unsupervised and overnight access due to the child's current estrangement from the respondent, I opted to adopt a phased access strategy. This approach was designed to facilitate a gradual and supportive reconnection between the child and the respondent. Consequently, the terms of access granted to the respondent to the child were as follows:

(i) online/virtual access to the child for a duration of up to 30 minutes, anytime between 7pm and 8pm on Mondays, Wednesdays, and Fridays, and it would be the petitioner's responsibility to facilitate this access without interruption, interference, or any attempt to frustrate it;

(ii) with effect of the date of delivery of this decision until 10 December 2023, access by the respondent to the child shall be granted every Saturday from 10am to 3pm, at a mutually agreed-upon location, under the supervision of the petitioner exclusively;

(iii) commencing 11 December 2023, the respondent shall enjoy unsupervised access to the child on alternate Saturdays and Sundays from 11am to 7pm;

(iv) for Chinese New Year 2024, the respondent shall have access to the child from 11am on the eve of Chinese New Year until 8pm on the fourth day of Chinese New Year. For the subsequent year 2025, the respondent shall have access to the child from 11 am on the fifth day of Chinese New Year, until 9pm on the ninth day of Chinese New Year. This arrangement would continue on an alternate-year basis.

(v) with effect from Chinese New Year 2024, the respondent shall enjoy unsupervised access to the child from 7pm on Fridays until 7pm on Sundays. Father's day and mother's day shall be carved out for the relevant parent; and

(vi) with effect from Chinese New Year 2024, the respondent shall also enjoy unsupervised access to the child on the child's birthday on alternate years, from 5pm to 8pm, if it is a school day. However, if it is a holiday, then the access to the child will begin from 7pm on the eve of the birthday until 8pm on the birthday itself.

The Assets

Whether Petitioner Was Entitled To Division Of Assets

[68] At the outset, with regard to the matrimonial home, both parties had informed the court that they would mutually agree to hold it in trust for the benefit of the child. The understanding was to facilitate the transfer of the matrimonial home to the child upon reaching the age of 21.

[69] The matrimonial assets that were contested were as follows:

A (i) property known as Taman Vista Jaya Property;

(ii) property known as Kuala Ampang Property;

(iii) property known as Pandan Terrace Property; and

(iv) shares in Super Group Resources Sdn Bhd.

B **[70]** The task of dividing matrimonial assets is prescribed by s. 76 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 76 - Power of court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subs. (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> (aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) **the needs of the minor children, if any, of the marriage**;
>
> (d) **the duration of the marriage**;
>
> and subject to those considerations, the court shall incline towards equality of division.
>
> (5) For the purposes of this section, references to assets acquired during a marriage include assets **owned before the marriage by one party which have been substantially improved during the marriage** by the other party or by their joint efforts. (emphasis added)

[71] With regard to the disputed properties, the petitioner sought for them to be sold by the respondent (with the respondent to bear all the costs of the sale) and for the petitioner to receive half the proceeds from such sale.

H **[72]** Concerning the Taman Vista Jaya Property, I had decided that the petitioner had no entitlement to it. This was based on the undisputed fact that she owned a property at Taman Vista Jaya as well, which she was unwilling to share with the respondent.

I **[73]** At this juncture, it was incumbent on me to state that divorce proceedings should not be converted into a revenue-generating exercise. The outcome of divorce must always be for parties to have sufficient resources

to move on in life as painlessly as possible. Consequently, I took the view that it would be fair and reasonable for each party to retain their respective properties in Taman Vista Jaya.

[74] In respect of the Kuala Ampang Property, the respondent claimed that he owned it with two friends, How Lim Leong and Tan Kian Teck, and that he was holding it in trust for them. The respondent further asserted that associated costs and instalments were paid by him and the two friends.

[75] With regard to the Pandan Terrace Property, the respondent asserted co-ownership with Tan Kian Teck. The respondent contended that he held the Pandan Terrace Property in trust for Tan Kian Teck with all associated costs and instalments being jointly covered by the two of them.

[76] I disagreed with the respondent's account of both the Kuala Ampang and Pandan Terrace properties, as the respondent had failed to provide any substantiating evidence for his claim that the properties were held in trust by him for his friends. It was important to note by virtue of s. 103 of the Evidence Act 1950, the legal burden rested on the respondent to establish the genuine ownership of the Kuala Ampang and Pandan Terrace properties. In my view, the respondent fell short of adducing any documentary evidence or summoning the purported friends in question who, according to him, were beneficiaries of the trust.

[77] Consequently, I concluded that the respondent was the sole owner of both the Kuala Ampang and Pandan Terrace properties. Considering that such properties were acquired during the course of the marriage, it followed that these properties qualified as matrimonial assets. Hence, the issue was how such properties were to be divided.

[78] While it was undisputed that the petitioner did not make monetary contributions to the Kuala Ampang and Pandan Terrace properties, I found it necessary to consider her significant non-financial contribution to the family's well-being as the primary caregiver for the child. However, acknowledging the relatively short duration of the marriage, which lasted only five years before the petitioner relocated from the matrimonial home, I opted to grant the petitioner 25% only of the realisable value of both the Kuala Ampang and Pandan Terrace properties. The realisable value in this context refers to the difference between the market value of the properties and the remaining balance on any loans against them. This award is to be fulfilled within six months from the date of the decision.

[79] In respect of the respondent's shares in Super Group Resources Sdn Bhd, the petitioner's prayer was for the complete transfer of these shares to her. I found this to be unreasonable, given the undisputed fact that the petitioner had made no financial contributions toward the acquisition of the company shares.

[80] Moreover, considering the fact that the respondent was ordered to fulfil his financial responsibilities, including child maintenance and the division of two properties, I deemed it fair and equitable for the respondent to retain ownership of the shares in Super Group Resources Sdn Bhd. This decision regarding the shares was aimed at balancing the financial obligations imposed on the respondent while acknowledging the lack of contribution from the petitioner towards the acquisition or growth of the shares in question.

Conclusion

[81] In conclusion, drawing upon the aforementioned rationales and having undertaken a thorough examination and discerning evaluation of the comprehensive evidence before this court, in conjunction with the submissions put forth by both parties, the petition and cross-petition were granted only to the following extent:

(i) divorce was granted, and the *decree nisi* was ordered to be made absolute immediately;

(ii) joint guardianship of the child was granted to both parties;

(iii) sole custody, care, and control of the child was given to the petitioner;

(iv) the respondent was granted access in accordance with the terms previously referenced in this judgment;

(v) the respondent was ordered to deposit monthly child maintenance of RM3,000 into the petitioner's bank account by the seventh day of each month;

(vi) the matrimonial home to be held by both parties in trust for the child, as agreed upon by them;

(vii) the contested matrimonial assets were divided according to the terms referenced in this judgment, with the petitioner awarded 25% of the realisable value of the Kuala Ampang Property and Pandan Terrace Property; and

(viii) costs to be borne by the individual parties.